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No. 88-1892

In The

Supreme Court of the United States

October Term

OPERATING ENGINEERS PENSION TRUST, *et al.*,

Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARK T. BENNETT
MERRILL, SCHULTZ & WOLDS, LIMITED
1855 First Avenue, Suite 100
San Diego, California 92101
(619) 234-4525

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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No. 88-1892

In The

Supreme Court of the United States

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OPERATING ENGINEERS PENSION TRUST, *et al.*,

Petitioners,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Thomas G. Daniel ("Daniel"), an individual doing business as Consolidated Concrete Pumping, respectfully requests that the petition for a writ of certiorari filed by petitioners Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust, and

Operating Engineers Training Trust ("Trusts") be denied.[1] Daniel is satisfied with the Trusts' list of the parties, the grounds for jurisdiction in this Court, and the Trusts' quotation of the pertinent statutory provisions. (Petition at ii, 2-4) Pursuant to Sup.Ct.R. 34.2, a further statement on these topics is omitted.

The Trusts did not include a reference to or a copy of the district court's order awarding Daniel costs and attorneys' fees under Employee Retirement Income Security Act of 1974 ("ERISA") § 502(g)(1), 29 U.S.C. § 1132(g)(1). A copy of that order is included as an appendix to this opposition. Daniel is otherwise satisfied with the Trusts' citation to the opinions and judgments in the district court and the court of appeals.

STATEMENT OF THE CASE

The Trusts sued Daniel in the United States District Court for the Central District of California pursuant to Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185 ("Section 301"), and ERISA § 502, 29 U.S.C.

[1] "Petition" refers to the Trusts' petition for a writ of certiorari. "App. Cert." refers to portions of the appendices to the Trusts' petition. "App. A" refers to excerpts from the pretrial conference order filed in the district court which is attached as Appendix A. "App. B" refers to the district court's order awarding Daniel costs and attorneys' fees under ERISA § 502(g)(1) which is attached as Appendix B. "App. C" refers to excerpts from the Trusts' opening brief in the court of appeals which is attached hereto as Appendix C.

§ 1132. The Trusts sought to recover fringe benefit contributions, liquidated damages, interest, and attorneys' fees in excess of $130,000. The Trusts' claim is premised upon an agreement, consisting of three pages, Daniel signed with International Union of Operating Engineers, Local 12 ("Local 12") on October 19, 1982. This agreement does not by its own terms require the payment of contributions to the Trusts. The massive monetary obligations asserted by the Trusts is derived from incorporated documents known as the San Diego County Master Labor Agreements ("MLA"), each of which is over 120 pages in length.

Daniel testified that he signed the agreement without reading it. He believed that the agreement and the other documents he signed on October 19 involved only an application for membership in Local 12. (App. Cert. at D-4) After hearing the testimony of the witnesses in a bench trial, United States District Judge John G. Davies believed Daniel. Judge Davies concluded that Daniel was not bound to the terms of the agreement based upon the following factual findings:

1. Daniel's prior nonaffiliation with Local 12 either as a member or as a union signatory employer;

2. The lack of any evidence that Daniel understood the basic operation of the agreement he signed;

3. Daniel's statements to Local 12 representative Robert Mathews prior to October 19 that he could not afford to become signatory to a contract with Local 12;

4. Daniel's understanding, based upon his discussions with Mathews, that the meeting on October 19 was for the sole purpose of having Daniel become a member of Local 12 so he could provide services and equipment to Local 12 signatory construction contractors as an owner-operator;

5. The fact that the agreement was presented to Daniel as the last document to be signed in a series of six different forms, the first four of which are completed only by applicants for membership in Local 12;

6. The presence of "X" marks made by Local 12 representative Elbert Thomas on the various documents signed by Daniel, including the agreement, indicating only the places for Daniel's signature; and

7. The fact that a copy of the incorporated MLA was not provided to Daniel at any time prior to the execution of the agreement and the fact that the terms and conditions of the agreement were never alluded to or brought to Daniel's attention.

(App. Cert. at D-2 – D-5) Judge Davies also found that the Trusts' suit against Daniel smacked of bad faith because of the close factual similarity between Daniel's case and prior litigation involving these same Trusts in *Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). (App. B at B-2)

The Trusts appealed Judge Davies' decision to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit accepted Judge Davies' factual findings.

The Ninth Circuit agreed that the accepted facts rendered Daniel's belief that the agreement involved only an application for union membership reasonable and justifiable. (App. Cert. at A-2 – A-5)

Judge Davies also awarded Daniel attorneys' fees in the amount of $31,170.25 and costs in the amount of $3,302.26 under ERISA § 502(g)(1) and Fed.R.Civ.P. 54. (App. Cert. at E-1) In exercising his discretion under ERISA § 502(g)(1), Judge Davies applied the standards set forth in *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). Judge Davies found that an award of attorneys' fees and costs was appropriate because: (1) the prosecution of the Trusts' action smacked of bad faith in light of the Ninth Circuit's prior *Gilliam* decision, (2) the Trusts possess the ability to satisfy an award of costs and fees against them, (3) such an award will deter others from acting under similar circumstances, and (4) the merits of Daniel's position was such that the Trusts should not, in good conscience, knowing all the facts, have burdened Daniel with the need to defend the action. (App. B at B-3) The Ninth Circuit affirmed the award of costs and attorneys' fees.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. None of the Questions Presented were Raised by the Trust Funds in the District Court or Before the Ninth Circuit in the Trusts' Opening Brief.

This Court does not consider issues which are neither raised before nor considered by the court of appeals.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); *Ramsey v. UMW*, 401 U.S. 302, 312 (1971). None of the questions presented for review were raised before either the district court or the Ninth Circuit in the opening brief.[2] Consequently, neither the district court nor the Ninth Circuit addressed any of the questions raised in the petition.

Before the district court and the Ninth Circuit, the Trusts admitted subject matter jurisdiction under ERISA § 502 and Section 301 as to all issues asserted by the parties. Those admissions are contained in the pre-trial conference order (App. A at A-2) and in the Trusts' opening brief (App. C at C-5).

The Trusts did not raise any issue regarding whether the National Labor Relations Board ("NLRB") has exclusive jurisdiction over the existence or validity of a collective bargaining agreement. (*See* App. A at A-3 – A-5; App. C at C-2 – C-3) The Trusts did not argue to the district court that federal courts are precluded by LMRA § 302, 29 U.S.C. § 186, and ERISA § 515, 29 U.S.C. § 1145, from considering a defense going to the existence of the underlying agreement in an action to collect fringe benefit contributions. (*See* App. A at A-3 – A-5) The Trusts' only argument to the Ninth Circuit on whether Daniel was bound to the agreement was that Daniel had not shown that Local 12 committed fraud in the execution of the agreement. (App. C at C-2 – C-3)

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[2] The Ninth Circuit will only consider those arguments raised in the opening brief. *Bricklayers, Local 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

On the question of the award of attorneys' fees, the Trusts' only argument to the Ninth Circuit was that the district court abused its discretion. (*Id.*, at C-4) They did not quarrel with the authority of the district court to award attorneys' fees under ERISA § 502(g)(1).

B. The Clear Trend in the Courts of Appeals' Decisions is that Section 301 Does Give Federal Courts Subject Matter Jurisdiction Over the Existence and Validity of a Collective Bargaining Agreement.

As conceded by the Trusts, the Third, Fifth, Tenth, and Eleventh Circuits have held that Section 301 gives the federal courts subject matter jurisdiction over whether a valid collective bargaining agreement exists. (Petition at 11) The recent opinions leave no doubt but that the Ninth Circuit is in agreement with these federal courts of appeals. *Rozay's Transfer v. Local Freight Drivers, Local 208*, 850 F.2d 1321, 1326 (9th Cir. 1988), *cert. denied*, 109 U.S. 1768 (1989); *IBEW, Local 532 v. Brink Constr. Co.*, 825 F.2d 207, 212 (9th Cir. 1987).

Inexcusably, the Trusts misrepresent that the Seventh Circuit disagrees with the Third, Fifth, Ninth, Tenth and Eleventh Circuits, citing *NDK Corp. v. Local 1550, United Food and Commercial Workers Int'l Union*, 709 F.2d 491 (7th Cir. 1983). (Petition at 11) *NDK Corp.* was expressly overruled more than five months ago. In *IBEW, Local 41 v. Sign-Craft Inc.*, 864 F.2d 499 (7th Cir. 1988), the Seventh Circuit reviewed the decisions of the other federal courts of appeals and the decisions of this Court regarding the

scope of subject matter jurisdiction under Section 301. The Seventh Circuit overruled *NDK Corp.* as having interpreted Section 301 too narrowly and held that "under Section 301(a), any disputes about the meaning or validity of collective bargaining agreements come within the jurisdiction of the federal courts." 864 F.2d at 502; *see also Mack Trucks, Inc. v. UAW*, 856 F.2d 579, 585-90 (3d Cir. 1988), *cert. denied*, 109 S.Ct. 1316 (1989) (where the Third Circuit canvassed over thirty years of this Court's precedents and reached the same conclusion).

Only two cases support the Trusts' position. Those are *Hernandez v. National Packing Co.*, 455 F.2d 1252 (1st Cir 1972), and *A.T. Massey Coal Co. v. UMW*, 799 F.2d 142 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 1964 (1987). *Hernandez* is over fifteen years old and has not been followed by any other federal court of appeals. *A.T. Massey Coal Co.*, while of a more recent vintage, suffers from the same infirmity. *A.T. Massey Coal Co.* has received sharp criticism for failing to articulate a legal basis for its holding that subject matter jurisdiction exists when a union files suit to obtain a ruling that an employer is bound to a collective bargaining agreement, but finding no subject matter jurisdiction in a case filed by the employer on identical facts alleging that the contract did not exist. *Mack Trucks, Inc.*, 856 F.2d at 589 n.10.

In light of the number of federal appellate courts which have found subject matter jurisdiction under Section 301 to determine the validity and existence of collective bargaining agreements, the *Hernandez* and *A.T. Massey Coal Co.* cases must be viewed as aberrational.

This is not the appropriate case to correct the decisions of the First and Fourth Circuits. The Trusts conceded subject matter jurisdiction in the lower courts. The Ninth Circuit did not discuss the nature of Section 301 jurisdiction. The exercise of jurisdiction over Daniel's defense is consistent with the decisions of a majority of the federal appellate courts which have confronted the issue.

C. There is no Conflict Among the Courts of Appeals Over Whether the NLRB has Exclusive Jurisdiction Over The Existence of a Collective Bargaining Agreement

The Trusts maintain that whether a binding agreement was formed between Daniel and Local 12 is within the exclusive jurisdiction of the NLRB. (Petition at 10, 16) The Trusts do not cite to the decision of a single federal appellate court which has accepted this novel theory. The Third, Seventh, and Ninth Circuits have ruled that the federal courts can resolve disputes over the existence of a collective bargaining agreement without treading upon the jurisdiction of the NLRB. *Sign-Craft, Inc.*, 864 F.2d at 503; *Mack Trucks, Inc.*, 856 F.2d at 591-92; *Brink Const. Co.*, 825 F.2d at 212. Given this agreement among the federal courts of appeals, there is no need for this Court to resolve the sham preemption issue first raised by the Trusts in its petition.

D. There is no Conflict Among the Circuits Regarding Whether the Existence of a Collective Bargaining Agreement is a Defense to an Action for Contributions.

The Trusts suggest that there is a conflict between the Ninth Circuit's decision in this case and the decisions in *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989), and *Bituminous Coal Operators' Ass'n, Inc. v. Connors*, 867 F.2d 625 (D.C. Cir. 1989). The Trusts maintain that these cases, which interpret ERISA § 515, "bar any defense against the enforcement of the written agreement for employee benefit contributions, specifically including any defense directed to the formation or existence of the contract." (Petition at 17) The Trusts' reading of these decisions is incorrect.

In neither *Gerber Truck Service, Inc.* nor *Connors* did the employer assert it did not intend to contract with the union or that it was misled about the nature of the documents signed. Each employer understood it was signing a contract which required the payment of trust fund contributions. In *Connors*, 867 F.2d at 627, the employer argued that bargaining history showed it was not required to pay pension contributions after the pension fund became fully funded. In *Gerber Truck Service, Inc.*, 870 F.2d at 1149-51, the employer claimed that it was not required to make contributions on behalf of non-union employees based upon a side agreement reached with a union official.

The courts in both cases relied upon the Ninth Circuit's decision in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). *Gerber Truck Service, Inc.*, 870 F.2d at 1149;

Connors, 867 F.2d at 634. In *Rozay's Transfer*, the Ninth Circuit acknowledged that an employer can defeat a trust fund collection action by proving that it signed an agreement while reasonably believing that the document was something entirely different than what it was in fact. But an employer cannot avoid the payment of trust fund contributions based upon an oral modification of the terms of a written contract made with a union agent. 791 F.2d at 773-74.

In this case, both the district court and the Ninth Circuit found that Daniel signed the agreement with Local 12 while reasonably and justifiably believing that he was merely applying for union membership. Neither *Gerber Truck Service, Inc.* nor *Connors* raises this question, as the employers in those cases relied only upon oral modifications to the terms of written contracts as a defense to the claims for contributions. There is no direct and irreconcilable conflict with those decisions.

E. The Trusts Have Shown no Basis for Reviewing the Award of Attorneys' Fees Under ERISA § 502(g)(1).

The Trusts have pointed to no conflict among the federal courts of appeals on the question of whether a prevailing employer such as Daniel can recover attorneys' fees under ERISA § 502(g)(1). The Trusts rely solely upon some mythical congressional history which they did not favor with a citation to the appropriate legislative materials. (Petition at 18)

In *Carpenters Southern Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1415 (9th Cir. 1984), the Ninth Circuit reviewed

the legislative history of ERISA § 502(g)(1). The court concluded that nothing in the legislative history supported a departure from the clear statutory language which gives discretion to the district court to award attorneys' fees to the prevailing party in actions by trust funds to recover contributions. Given ERISA § 502(g)(1)'s unambiguous language, there is no need to consult its legislative history. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 185 n.29 (1978); *Ex parte Collett*, 337 U.S. 55, 61 (1949).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MERRILL, SCHULTZ & WOLDS, LIMITED

Dated: June 13, 1989

MARK T. BENNETT, Attorneys
for Thomas G. Daniel,
an individual
doing business as
Consolidated Concrete
Pumping

APPENDIX A

JETT, CLIFFORD & LAQUER
Michael A. Urban
Carol Jo Morgan
3055 Wilshire Boulevard
Suite 420
Los Angeles, California 90010
(213) 380-2082

Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, et al., Plaintiffs, vs. THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING, Defendant.	CASE NO. CV 85-5064 JGD (Mcx) PRETRIAL CONFERENCE ORDER (Filed December 15, 1986) Date: December 15, 1986 Time: 1:30 p.m.

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action for money for breach of a written agreement covering the period October 19, 1982, to June 15, 1985. The plaintiffs are the Operating Engineers Pension Trust, Operating Engineers Health and Welfare

Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust (hereinafter "Trusts"). The defendant is Thomas G. Daniel, an individual doing business as Consolidated Concrete Pumping (hereinafter "Consolidated"). Each of these parties has been served and has appeared. There are no other parties named in the pleadings.

The pleadings which raise the issues are the Complaint and the First Amended Answer to Complaint.

II

Federal Jurisdiction and venue are invoked upon the grounds that the action is brought upon the breach of an alleged written collective bargaining agreement between Consolidated, an employer primarily engaged in the building and construction industry, and the International Union of Operating Engineers, Local Union No. 12 (hereinafter "Local 12"), a labor organization representing employees in an industry affecting interstate commerce. Jurisdiction is based on Section 301(a) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 185(a)] (hereinafter "LMRA"), and Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1132(e)(1)] (hereinafter "ERISA"). Federal jurisdiction for the period October 19, 1982, to June 15, 1985, is admitted. Venue is conceded as all parties have generally appeared herein.

* * *

VII

The following issues of fact, and no others, remain to be litigated at trial:

1. Did Daniel understand on October 19, 1982, that he was signing an agreement with Local 12 on behalf of Consolidated.

* * *

6. Does Consolidated owe the Trusts any money as and for fringe benefit contributions on its employees, and if so, in what amount?

* * *

12. Pursuant to Section 29 U.S.C. § 1132(g)(1), do the Trusts owe Consolidated any money as and for attorney's fees, and if so, in what amount?

VIII

The following issues of law, and no others, remain to be litigated at the trial:

1. Was Consolidated bound to the terms of the Agreement signed by Daniel on October 19, 1982, and the terms of the Master Labor Agreement and Trust Agreements incorporated therein?

a. If so, could Daniel repudiate Consolidated's Agreement prior to June 15, 1985, pursuant to Section 8(f) by conduct? If so, was the Agreement so repudiated, and on what date?

b. If so, could Daniel repudiate Consolidated's Agreement prior to June 15, 1985, pursuant to Section 8(f) by submitting its notice of intent to terminate dated

March 7, 1985. If so, was the Agreement so repudiated and on what date?

2. Are the Trusts entitled to any money from Consolidated as and for fringe benefit contributions for hours worked by or paid to Consolidated's employees? If so, what amount is due and owing?

3. Are the Trusts entitled to any money as and for damages from Consolidated for non-union subcontracting violations? If so, what amount is due and owing?

4. Are the Trusts' claims for work performed by persons not employed by Consolidated and by Daniel's children barred by illegality? [Plaintiffs do not contend that this is an issue].

5. Are the Trusts entitled to any money from Consolidated as and for liquidated damages for breach of the Master Labor Agreement or 29 U.S.C. § 1132(g)(2)(C)? If so, what amount is due and owing?

6. Pursuant to the Master Labor Agreement or 29 U.S.C. § 1132(g)(2)(D), are the Trusts entitled to any money from Consolidated as and for auditing costs and attorney's fees incurred by the Trusts? If so, what amounts are due and owing?

7. Pursuant to 29 U.S.C. § 1132(g)(2)(B), are the Trusts entitled to any money from Consolidated as and for prejudgment interest? If so, what amount is due and owing?

8. Is Consolidated entitled to attorney fees from the Trusts, and if so, what amount is due and owing?

* * *

XV

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Pretrial Conference Order shall supersede the pleadings and govern the course of trial of this case, unless modified to prevent manifest injustice.

DATED: December 15, 1986

/s/ John G. Davies
UNITED STATES
DISTRICT JUDGE

Approved as to form and Content:

JETT, CLIFFORD & LAQUER

Michael A. Urban
Carol Jo Morgan

By Carol Jo Morgan
Carol Jo Morgan
Counsel for Plaintiffs

MERRILL, SCHULTZ & WOLDS, LIMITED

By Mark T. Bennett
Mark T. Bennett
Counsel for Defendant

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST and OPERATING ENGINEERS TRAINING TRUST,	CASE NO. CV 85-5064 JGD
Plaintiffs,	ORDER RE AWARD OF COSTS AND ATTORNEY'S FEES
v.	(Filed May 22, 1987)
THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING.	
Defendant.	

Following the court trial of the action herein, defendant Thomas G. Daniel, on May 7, 1987, filed his Application for Costs and Attorney's Fees pursuant to 29 U.S.C. § 1132(g)(1) and Federal Rules of Civil Procedure, Rule 54.

The Court having considered the evidence at trial, the application of the defendant, the memoranda of points and authorities, declarations and argument of counsel, for the reasons set forth herein below, rules as follows:

The plaintiffs are fiduciaries as contemplated by 29 U.S.C. § 1132(g)(1). Under said statute the Court has discretion to allow reasonable attorney's fees and costs and to award same to the prevailing defendant.

An award of attorney's fees and costs is particularly appropriate in this case because the facts herein closely parallel the facts in *Operating Eng. Pension Trust v. Gilliam*, 737 F.2d 1501 (9th Cir. 1984). The Court is persuaded to exercise its discretion and award attorney's fees and costs to the defendant not only by the mandate of *Gilliam*, but also by the fact that the plaintiffs in *Gilliam* are the plaintiffs in this action and, as in *Gilliam*, are represented by the same counsel, Jett, Clifford & Laquer.

In determining reasonable attorney's fees and costs, the Court has considered the following factors and based its determination thereon: (1) the novelty and complexity of the issues presented; (2) the time devoted to the case by counsel for the defendant; (3) his ability and experience; (4) customary attorneys fees charged in this district; and (5) awards in similar cases. (*Kerr v. Screen Extra Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975)).

The Court, in considering the award of attorney's fees and costs in defendant's favor, and against plaintiffs, is cognizant of the factors set forth in *Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980). The Court finds that the amount of attorney's fees and costs claimed is reasonable. The Court exercises its discretion to make this award because, (1) the prosecution of this action in light of *Gilliam* smacks of bad faith on the part of the plaintiffs, (2) the plaintiffs possess the ability to satisfy an award of fees and costs against them, (3) such an award would

tend to deter others from acting under similar circumstances, and (4) the merits of the defendant's position were such that the plaintiffs should not, in good conscience, knowing all the facts, have burdened defendant with the need to defend this action.

The defendant is awarded attorney's fees in the sum of $31,170.25, and costs, in addition to those otherwise recoverable against plaintiffs, in the sum of $3,302.26.

Dated this 22nd day of May 1987.

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge

APPENDIX C

No. 87-6057

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPERATING ENGINEERS PENSION TRUST, OPERATING ENGINEERS HEALTH AND WELFARE FUND, OPERATING ENGINEERS VACATION-HOLIDAY SAVINGS TRUST and OPERATING ENGINEERS TRAINING TRUST,

Plaintiffs-Appellants,

vs.

THOMAS G. DANIEL, an individual doing business as CONSOLIDATED CONCRETE PUMPING.

Defendant-Appellee.

On Appeal From the United States District Court for the Central District of California

---

OPENING BRIEF OF APPELLANTS

WAYNE JETT
JETT & LAQUER
225 South Lake Avenue
Suite 200
Pasadena, California 91101
(818) 449-1882

Counsel for Plaintiffs-Appellants

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STATEMENT OF THE ISSUES

1. Did the district court err in concluding that no contractual obligation resulted from the signing of the collective bargaining agreement by Daniel and Local 12?

2. Did the district court err in failing to rule that "repudiation" is not a defense to enforcement of the collective bargaining agreement?

3. Did the district court err in failing to award the Trusts' delinquent contributions, prejudgment interest, liquidated damages, audit costs and attorney's fees incurred as provided by 29 U.S.C. § 1132(g)(2)?

4. Did the district court err in awarding attorney's fees and "special costs" to Daniel?

* * *

a. *Subject Matter Jurisdiction In The District Court.*

Subject matter jurisdiction in the district court under 29 U.S.C. §§ 185 and 1132 is uncontested. The district court ruled that such jurisdiction exists. CR: 61, p. 6. This action is to enforce payment of employee benefit contributions under an agreement between an employer and a labor organization. *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 760 (9th Cir. 1981).

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